Court File No. 22191

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SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Manitoba)

DONALD VICTOR BUTLER

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM OF THE INTERVENO
ADIAN CIVIL LIBERTIES ASSO
ASSOCIATION FOR RIGHTS A

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PART I - STATEMENT OF FAC

lian Civil Liberties Association ("CCLA") and the Manitoba Association for Rights and Liberties ("MARL") agree with the description of the procedural history of this appeal contained on pages 1-4 of the Appellant's factum.

2. CCLA and MARL submit that the sale by the Appellant of the video tapes and other articles in this case falls within the zone of freedom guaranteed by section 2(b) of the *Charter* and that s.163 of the *Criminal Code of Canada* unconstitutionally impinges on that freedom. CCLA and MARL further submit that s.163 cannot be saved under s.1 of the *Charter*. Section 163, as applied by the courts, is too vague to constitute a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society.

PART II - ISSUES

3. The constitutional questions in this appeal are set out in the Appellant's factum at page 5.

PART III - ARGUMENTS

(A) Does Section 163 of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46 Violate Section 2(b) of the *Canadian Charter of Rights and Freedoms*?

(i) Interpretative Approach

4. It is respectfully submitted that the court must take a purposive approach to the interpretation of the freedoms guaranteed by s.2(b) of the *Charter*. This requires an analysis of the purpose of the guarantee in question and the interests sought to be protected. Further, the interpretation given must be generous, not legalistic, and aimed at securing to individuals the full benefits of the *Charter's* freedoms.

Hunter v. Southam Inc., [1984] 2 S.C.R. 145

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344

5. It is submitted that freedom of expression ought to be restricted only in the clearest of circumstances and that it is only in such circumstances that it ought to be said that expressive material does not fall within the ambit of the freedom.

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 at 1331

(ii) The Central Importance of Freedom of Expression in a Free and Democratic Society

6. Freedom of expression is fundamental to a free and democratic society because a diversity of thoughts, opinions and beliefs is prized for its inherent value to both the community and the individual. Freedom of expression has been said to be the "indispensable condition of nearly every other form of freedom" and as being "little less vital to man's mind and spirit than breathing is to his physical existence". Indeed it has been said that it is difficult to imagine a guaranteed right which is more important to democratic society than freedom of expression.

Irwin Toy Limited v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at 968-9

Edmonton Journal, supra, at 1336

7. The guarantee of freedom of expression ensures that it is the individual and not the government that decides which of the diversity of thoughts, opinions and beliefs the individual accepts, listens to or believes. The freedom is a manifestation of the belief that individuals can only be creative, realize their individual potential and be intellectually robust if they are free to choose from the widest diversity of thoughts, opinions and beliefs no matter how unpopular, distasteful and contrary to the mainstream. An integral part of realizing one's potential is the freedom to define the terms of that potential. It is only if individuals have these freedoms that the state and its institutions will remain robust and free. The alternative is tyranny, conformity, irrationality and stagnation for both individuals and the state.

Irwin Toy, supra, at 968-71

8. The kind of law which is at issue in this appeal can be and has been used to weaken cultural, artistic, aesthetic and intellectual life. Such a law inhibits

the freedom of the individual to enrich and to be enriched which is one of the very hallmarks of a civilized society.

(iii) What is Expression?

9. It is submitted that this Honourable Court has enunciated a three-fold test for the determination of whether particular speech or conduct falls within the zone of freedom of expression protected by s.2(b):

(a) is the speech or conduct expressive or, does it attempt to convey a meaning?

(b) if so, does that expressive activity take a prohibited form;

(c) if not, does the regulation of the speech or conduct have as its purpose the restriction of the content of expression or, alternatively, is that its effect?

Reference re: ss. 193 and 195.1 (1)(c) of Criminal Code, [1990] 1 S.C.R. 1123, at 1180-8 (per Lamer, J.)

Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232 at 244-5

(a) A Meaning is Conveyed

10. The term "expression" embraces all content of expression irrespective of the particular meaning or message sought to be conveyed. Conduct is expression if it conveys or attempts to convey a meaning.

R. v. Keegstra (1990), 61 C.C.C. (3d) 1 at 21 (per Dickson C.J.C.)

11. The matter which is the subject of s.163 is sexual activity. Such activity is part of the human experience. Whether one views its depiction as merely portraying physical activity, as portraying a way of life, as educating the uninitiated, as presenting a variety of human sexual experiences, as entertainment or as stretching the boundaries of taste, a meaning is conveyed.

(b) The Form of Expression is not Prohibited

12. It is submitted that the type of expression which will not receive protection is narrow. If the meaning is conveyed through a traditional form of expression like the written or spoken word, film or art, then the restriction impinges on freedom of expression and must be justified under s.1.

Reference re: ss. 193 and 195.1 (1)(c) of Criminal Code, supra, 1184 & 186, (per Lamer, J.)

13. It is submitted that the freedom of expression applies to listeners and watchers as well as speakers and as well applies to all phases and forms of expression from creator to distributor and retailer and on to the reader or viewer.

Ford v. Quebec (Attorney-General), [1988] 2 S.C.R. 712 at 767

Re Information Retailers Association and Metropolitan Toronto (1985), 22 D.L.R. (4th) 161 (Ont. C.A.) at 1820

Re Ontario Film & Video Appreciation Society and Ontario Board of Censors (1988), 41 O.R. (2d) 583

(c) The Purpose of Section 163 is to Restrict Freedom of Expression

14. If the purpose or the effect of the statute is to single out meanings which are not to be conveyed then it has as its purpose the restriction of the content of expression.

Irwin Toy, *supra*, at 974

Rocket, *supra*, at 245

15. It is respectfully submitted that s.163 of the *Criminal Code* has as both its object and purpose and its effect the prohibition, with penal sanctions, of the creation, publication and distribution of meanings relating to human sexual activity. It therefore has, as its object and effect the direct suppression of such meanings.

16. Accordingly, it is submitted that the purpose of s.163 is to restrict freedom of expression.

(d) Conclusion

17. It is therefore submitted that materials which fall within s. 163 also fall within the protected zone of freedom of expression and that therefore s.163 impinges on that zone. Section 163 must therefore be justified under s.1.

(B) If section 163 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 violates s.2(b) of the *Canadian Charter of Rights and Freedoms*, can s. 163 of the *Criminal Code of Canada* be demonstrably justified under s.1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law?

18. The onus of justifying a restriction on a constitutionally protected freedom under s.1 of the *Charter* rests upon the party seeking to uphold it. The standard of proof to be applied is that of a preponderance of probability. However, a very high degree of probability is required to justify a violation of a constitutionally protected freedom, particularly one which is drafted in seemingly absolute language.

Irwin Toy, *supra*, at 986

R. v. Oakes, [1986] 1 S.C.R. 103

19. It is submitted that the approach to be taken in determining whether a limitation of a fundamental freedom is reasonable and demonstrably justified in a free and democratic society is:

(a) it must be prescribed by law;

(b) the legislative objective behind the limitation must relate to concerns which are pressing and substantial in a free and democratic society, sufficient to warrant overriding a constitutionally protected right; and

(c) the means used must be proportional or appropriate. In assessing this proportionality the court must weigh three factors:

(i) whether the measure is carefully designed to achieve the objective without being arbitrary, unfair or based on irrational considerations.

(ii) whether the means chosen impair the freedom in question as little as possible, having regard to the context and surrounding circumstances: and

(iii) whether there is proportionality between the effects of the measures and the identified object.

Oakes, *supra*, at 138 ff

R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713

I. Prescribed by Law

20. It is submitted that for a limit to be prescribed by law, it must be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain or subject to discretionary determination is an unreasonable limit and is not prescribed by law.

Luscher v. Deputy Minister, Revenue Canada, Customs & Excise, [1985] 1 F.C. 85 at 89-90

Reference re ss.193 and 195.1(1)(c) of Criminal Code, supra, at 1155 (per Lamer, J.)

21. While no law can be absolutely certain, a limitation on a guaranteed freedom must be such as to allow a very high degree of predictability as to whether an individual's actions are legal or not.

Luscher, supra, at 90

Reference re ss. 193 and 195.1(1)(c) of Criminal Code, supra, at 1156

22. As applied in American law, the void for vagueness doctrine has been described as follows:

> ....a law is void on its face if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application". Such vagueness occurs when a legislature states its proscriptions in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork...
>
> *Tribe*, American Constitutional Law, 2nd cd. (1988), pp. 1033-4, as cited in *Keegstra*, supra, at 89-90 (per McLachlin, J., dissenting)

23. The rationale for invalidating statutes that are vague is that they have a chilling effect on legitimate speech because individuals are unable to tell whether their speech falls within the statute or not.

R. v. Keegstra, supra, p. 90

24. It is submitted that s.163, as applied in judicial decisions, is impermissibly vague. As noted below, the test for undueness is what has come to be

known as the community standard of tolerance test. This test is impermissibly vague for the following reasons:

1. It is difficult, if not impossible, for a person seeking to comply with the law to have notice of whether or not it applies to the proposed conduct.

   Report of the Special Committee on Pornography and Prostitution, 1985, Vol. 1, p.269

2. In a geographically diverse, multicultural community the identification and application of a national standard is impossible for both an individual seeking to conform with the law and for a jury attempting to apply it.

   House of Commons Standing Committee on Justice and Legal Affairs, Report on Pornography, Issue #18, Wednesday, March 22, 1978, 3rd Session, 13th Parliament, 1977-78, pp. 18-7 - 18-8

   R. v. Doug Rankine Co. (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.)

3. The section does not define "undueness".

4. Because the Crown need not tender evidence as to what the standard is, the judge or jury must identify it from their own experience and knowledge. The standard is therefore open to the subjective reaction of the judge or jury to the articles in issue. The words of Justice Stewart of the United States Supreme Court in relation to his view of what constitutes obscenity are apt:

   ....criminal laws....[against obscene motion pictures]....are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it....

Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494

Report of the Special Committee on Pornography and Prostitution, supra, pp.116-7

Jacobellis v. Ohio, 378 U.S. 184 (1964)

25. It is submitted that in fact obscenity has not been "intelligibly" defined, and that the freedom of free expression is drastically infringed by a law that allows judges and juries to apply their own, "I know it when I see it" standard. Such a standard does not allow an individual to predict the legal consequences of his or her actions. Because the individual is unable to know when he or she is running afoul of it, s.163 results in a chilling effect on legitimate expression.

26. It is submitted that such a standard is no standard at all. The individual is left in a quandary - forced to stay away from all expression which might fall within the section or risk prosecution. Individuals should not be left to guess whether matter is caught by the section nor should they be left to the vagaries of bureaucratic enforcement or to the popular pressures that arise to influence enforcement.

27. It must not be forgotten that in the enforcement of s.163 police officers are the effective censors. For example, people will often comply with a request from a police officer rather than risk a criminal prosecution.

28. Section 163 makes book selling, video retailing, and running a theatre, art gallery and library into hazardous occupations, to the extent that any matter having to do with sexual relations is dealt with.

Re Information Retailers Association, supra, at 182

Ginsberg v. State of New York, 390 U.S. 629 (1968) at 674

II. OBJECTIVE

29. It is submitted that there is no pressing and substantial legislative objective for s.163.

30. The Fraser Committee, which conducted a full review of the available evidence, concluded that on the basis of the evidence and research it saw, (which it found to be "contradictory or inconclusive") it was not prepared to state that pornography was a significant causal factor in the commission of violent crimes, in the sexual abuse of children, or in the disintegration of communities and society.

> *Report of the Special Committee on Pornography and Prostitution*, supra,p.99

31. Indeed one of the leading researchers in the area has stated that the most that has been demonstrated is a short-term causal link between exposure to pornography and effects on attitudes. What has not been shown is a causal link between exposure to pornography and behaviour nor that there is any long-term change, even of attitudes.

> Donnerstein, E.J. and Linz, D.G. "*The Question of Pornography*", Psychology Today, December, 1986, p.56
>
> Edward J. Donnerstein, quoted in "*The War Against Pornography*", Newsweek, March 18, 1985, p.62.

32. It is submitted that while suppression of matter may be justifiable where there is an imminent peril, it is not justifiable even if long-term exposure to it would lead to a change in attitudes.

33. In a democracy the appropriate response to material that may lead to "bad" attitudes is material that may lead to "good" attitudes. If there is time for the "bad" material, then there is time for the "good" material.

34. CCLA and MARL accept that there is some dreadful material circulating in Canada. However, it is one thing to condemn it but quite another to suppress it by criminal prosecution.

35. Accordingly, it is submitted that the infringement of the freedom guaranteed by s.2(b) of the *Charter* cannot be justified under s.1 as it does not relate to concerns which are pressing and substantial.

III MEANS

36. If, contrary to the above submissions, this Honourable Court finds that there is a pressing and substantial legislative objective, this Honourable Court must still consider the means used by Parliament to achieve that objective and the proportionality between the means used and the objective.

37. In considering the means used, the Court should review:

1. The use of the criminal sanction;
2. The scope of the offence; and
3. The definition of obscenity.

(a) <u>The Criminal Sanction</u>

38. The criminal law is a very special form of governmental regulation as it expresses society's collective disapprobation of certain acts and omissions and can result in the loss of liberty.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 70

Reference re ss 193 and 195.1(1)(c) of Criminal Code, supra, at 1215 (per Wilson, J.)

39. As such the imposition of criminal sanctions ought to be reserved for those cases truly deserving of society's disapprobation. In addition, it should only be applied in circumstances in which individuals are able to know with some certainty that an offence has been or is about to be committed.

40. It is submitted that as the infringement of s.2(b) involves a criminal law sanction with its associated risks of prejudice through prosecution, fine or imprisonment, the Court ought to be especially confident that s.163 is a measured and appropriate response to obscenity before justifying it under s.1.

(b) The Scope of the Offence

41. Beside the very broad and vague test of community standards it is submitted the language of s.163 raises other serious concerns.

42. Section 163(8) speaks of an "undue exploitation of sex". It is submitted that this language is unnecessarily vague. What, for example, constitutes a "due exploitation of sex"?

43. The scope of the offence extends to the making or creation of an obscene matter, whether intended for public distribution or not, and whether confined to the privacy of one's home or not.

Hawkshaw v. The Queen, [1986] 1 S.C.R. 668

44. The Crown need not prove harm to any members of the community, or indeed, to the community itself.

45. An honest and reasonable belief that the matter does not violate community standards of tolerance is no defence to a charge under s.163.

R. v. Metro News Ltd (1986), 29 C.C.C. (3d) 35 (Ont. C.A.)

46. Because an accused must establish the defence, matter about which there is a reasonable doubt that it serves the public good is caught by the section.

ss.163(3) and (4)

R. v. Cameron, [1966] 2 O.R. 777 (Ont. C.A.)

(c) Community Standards Test

47. To determine "undueness" the test to be applied is whether the accepted standards of tolerance in the contemporary Canadian community, taken as a whole, have been exceeded. What is important is not what Canadians think is right for themselves to see but rather what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standards of tolerance to allow them to see it. The audience to which a film or other publication is exposed is not relevant to a consideration of whether it is obscene.

Towne Cinema Theatres Ltd., supra

48. It follows from the above that the standard:

1. is a nation-wide and not a local standard;
2. is contemporary and therefore capable of change;
3. is objective;
4. must reflect a general average of community feeling; and
5. must be identified without regard to the audience or the context in which the matter is seen.

(A) Minimal Impairment

49. Assuming that it can be said that there is a rational connection between s.163 and the Parliamentary objective, it is submitted that s.163 does not result in a minimal impairment of the freedom guaranteed by s.2(b) because it is over broad, it is vague and because there are other alternatives.

(a) Overbreadth and Vagueness

50. It is submitted that the doctrine of overbreadth is applicable to s.163. As used in American jurisprudence the doctrine is defined as follows:

> Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licenses issued are over broad because they grant such officials the power to discriminate - to achieve indirectly through selective enforcement a censorship of communicative context that is clearly unconstitutional when achieved directly.
>
> *Tribe*, op. cit, p. 1056, as cited in *Keegstra*, supra, at 89, (per McLachlin, J., dissenting)

51. The rationale for invalidating statutes that are over broad is that they have a chilling effect on legitimate speech. Protection of free speech is such a high value that legislation aimed at legitimate ends, and in practice used only to achieve those legitimate ends, may be struck down if it also tends to inhibit protected speech.

Keegstra, supra, at 90 (per McLachlin, J., dissenting)

52. It is submitted that s.163 is over broad. First, the circumstances in which offending speech will be caught are virtually unlimited. Even matters made for oneself, in the privacy of one's home are caught by the section. The section

prevents the making and publication of matters caught by it in any and all forums and through any and all media. Speeches, books, films, works of art and other objects are all subject to the section.

Hawkshaw, supra

53. Second, while Section 163(3) provides a defence of "public good" it places the onus of establishing it on the accused.

54. Third, a good test of whether the section is over broad lies in how it has been applied. Section 163 has been applied in all manner of questionable ways. In view of the chilling effect on speech, it is submitted that this Honourable Court ought to consider not only convictions that have been sustained but also charges that have been laid - or even threatened - and materials that have been seized - or even detained:

i) "Lady Chatterley's Lover" - conviction overturned in *Brodie v. R.*, [1962] S.C.R. 681;

ii) "Fanny Hill" - conviction overturned in *R. v. C. Coles Co. Ltd.*, [1965] 1 O.R. 557 (Ont. C.A.);

iii) "Last Tango in Paris" - prosecuted in *R. v. Odeon Morton Theatres Ltd. and United Artists Corp.*, (1974), 16 C.C.C. (2d) 185 (Man. C.A.)

iv) the children's educational book "Show Me" - prosecuted in *R. v. The MacMillan Company of Canada Limited* (1976), 13 O.R. (2d) 630;

v) film dealing with male masturbation produced for the State University of New York and destined for the University of Manitoba Medical School - seized by customs officials acting under a provision under the *Customs Act* which is similar to

s.163; see Borovoy, When Freedoms Collide: The Case for Our Civil Liberties (Lester & Orpen Dennys: Toronto, 1988), p. 63;

vi) Offices of Alberta Coalition Against Pornography - raided and materials seized; cited in *Borovoy*, op. cit., p.62;

vii) "The ~~Joy~~ of Gay Sex" and articles telling readers how to avoid AIDS by practising "safe sex" - subject to censorship; see Barber, "Sex and Censorship" in 99 Maclean's No. 35, Sept, 1, 1986, p.36 at p.40; and

viii) ~~Painting of Mayan woman being raped by Guatemalan soldiers~~ displayed in Maximum Art Gallery - owners threatened by the police with prosecution under the predecessor to s.163; see King, L., "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better?", in "Women Against Censorship", ed. V. Burstyn, (Douglas & McIntyre: Vancouver, 1985), p. 87.

55. It is further submitted, for the reasons cited in paragraphs 19 to 27 above, that section 163 is too vague to result in a minimal impairment of the constitutionally guaranteed freedom of expression.

(b) Other Alternatives

56. It is submitted that the legitimate objectives of this kind of legislation (eg. keeping certain materials away from children) can be met by reasonable time, manner and place restrictions on the dissemination of matter thought to potentially fall within s.163.

57. Moreover, it is submitted that there are far more effective techniques to promote such legitimate objectives. For example, if pornography is seen as encouraging violence against women, there are certain activities that discourage it -

counselling rape victims to charge their assailants, provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase the sensitivity of law enforcement agencies and other governmental authorities to such issues, etc.

58. In addition, it is submitted that ~~education is an under-used~~ response. Education can have a significant impact on people's behaviour (for example, reports, of the U.S. Surgeon General on nicotine and cancer appear to have brought about a significant reduction in smoking in the United States). Thus an effort to educate the community about the rights and dignity of women and children is likely to be far more effective than prosecution under s. 163.

Borovoy, op. cit., p.66

59. Human rights codes prohibiting discriminatory behaviour on the basis of sex are also likely to be far more successful in promoting the dignity of women than is criminal prosecution for unacceptable speech.

Borovoy, op. cit., pp.221-5

60. Accordingly, it is submitted that s.163 does not minimally impair the freedom guaranteed by s.2(b). The section is over broad, vague and is not the least intrusive alternative.

(B) Importance of the Right versus Benefit Conferred

61. It is submitted that under the third branch of the proportionality test the Court must balance the importance of the infringement of the right in question against the benefit conferred by the legislation.

62. The infringement of the guarantee of freedom of expression is a serious one. Section 163 regulates not only the form of expression but also its content. It covers all manner of media of expression and applies to all expression, both public and private. A wide variety of matter has been subject to the prohibition set out in s.163.

63. The limitation therefore strikes at the very lifeblood of our culture.

64. Moreover, the consequences of the infringement are severe. Individuals convicted may face imprisonment, or a fine and will receive a criminal record.

65. These consequences are exacerbated by the fact that individuals cannot easily avoid prosecution by avoiding the expression which leads to prosecution (except by entirely avoiding the whole area of sexual relations) because the law is vague and subjective.

66. It is submitted that this serious infringement can only be justified by a carefully tailored countervailing state interest of the most compelling nature.

67. The objectives of s.163 are not of such a carefully tailored compelling nature. As noted above the objective is not a compelling state interest and that legitimate state interest is not best fostered through criminal prohibition. The objectives sought are best achieved through other, less coercive means.

(C) Conclusion

68. It is therefore submitted that the serious limit on the freedom of expression guaranteed by s.2(b) of the *Charter* cannot be justified under s.1. The limit is so vague as to be not prescribed by law, there is no compelling state interest and the means chosen are not proportionate to the state's ends.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Sheila Block

Mark R. Hemingway
Of Counsel for Canadian Civil Liberties Association and Manitoba Association for Rights and Liberties

SCHEDULE "A"

TABLE OF CASES

Hunter v. Southam Inc., [1984] 2 S.C.R. 145

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 344

Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326 at 1331

Irwin Toy Limited v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at 968-9

Reference re: ss. 193 and 195.1 (1)(c) of Criminal Code, [1990] 1 S.C.R. 1123, at 1180-8 (per Lamer, J.)

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R. v. Oakes, [1986] 1 S.C.R. 103

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Luscher v. Deputy Minister, Revenue Canada, Customs & Excise, [1985] 1 F.C. 85 at 89-90

R. v. Doug Rankine Co. (1983), 9 C.C.C. (3d) 53 (Ont. Co. Ct.)

Ginsberg v. State of New York, 390 U.S. 629 (1968) at 674

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 70

Hawkshaw v. The Queen, [1986] 1 S.C.R. 668

R. v. Cameron, [1966] 2 O.R. 777 (Ont. C.A.)